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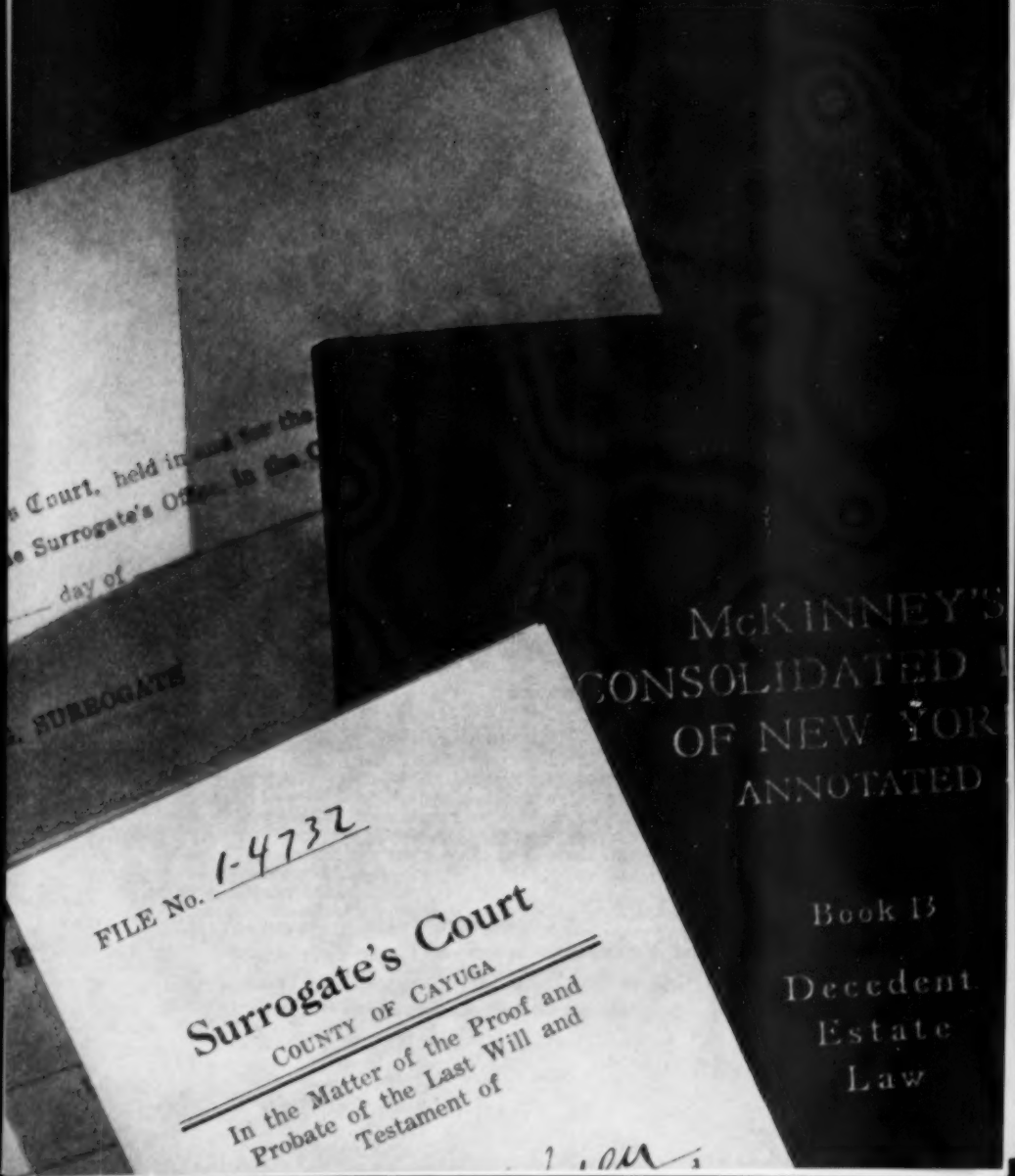
WAYS TO TRANSFER PROPERTY TO HEIRS

- intestate succession
- wills
- joint ownership

Ann Aiken Ellis and Dorothy Klitzke Ashkenas



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WAYS TO TRANSFER PROPERTY TO HEIRS

By Ann Aikin Ellis and Dorothy Klitzke Ashkenas[1]

Do you know what would happen to your property if you died tomorrow? To your farm equipment and livestock, as well as to the land and buildings? You can help your heirs greatly if you spend some time now thinking through plans for the settlement of your estate.

The first section of this bulletin is a description of the general provisions of the law concerning transfer of property at death. The second section is a report of what methods farm families are commonly using and some of the experiences farm families have had with these procedures.

Of course, the authors are not presuming to give legal advice. Rather, we hope this bulletin will help all of us recognize more clearly some of the problems in handing property on to others after death and to know enough about ways transfers are made to ask intelligent questions of a lawyer, as well as to realize the advisability of seeking professional advice in order to avoid difficulties. Professional advice should always be obtained in relation to specific problems. Attempts by laymen to write their own wills are frequently unsuccessful and should be discouraged.

Taking the Laws of New York State into Account

The owner of any kind of property, whether a house or a diamond ring, has several choices offered him by the laws of New York State for transfer of property to heirs: He may let the estate be distributed to those specified by law (that is, by intestate succession); make a will; or arrange for joint or single ownership of real and personal property.

Intestate Succession

A common procedure in New York State is to let property pass to heirs without making any will, that is, by intestacy. The provisions for distributing such an estate were greatly revised in 1930;[2] but they have stood since that time virtually without change.

[1] Acknowledgment is made of the assistance of Mrs. William B. Landis, Jr., a graduate of the Cornell Law School, and of the counsel given by Professor G. J. Thompson of that school. Facts were also obtained from Mrs. Mary Mineah, Clerk of the Tompkins County Surrogate's Court, and Judge Leonard H. Searing and Mrs. Laura Cleveland of the same court in Cayuga County. Mrs. Mary Beck, a lawyer, who had worked with the New York State Law Revision Commission, helped to revise the bulletin.

[2] For example, the right of dower was abolished, except for those persons who were married before September 1, 1930. The property that came into their possession before that date still carries dower rights for the widow. That is, the widow is entitled to one-third of the income and interest from any of the real estate owned by her husband. Her consent must be obtained before the property is sold, unless her portion has been purchased by other heirs. Dower rights lapse, however, at her death.

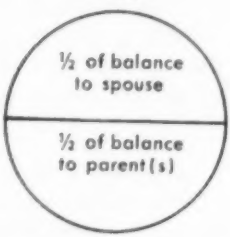
The diagrams and comments below describe specifically what happens to the property of a New York State resident who has not made a will.[3] In general, the priority is given to children, then in descending order to the surviving husband or wife, to the parents of the deceased, his brothers and sisters or their children, and finally to the grandparents and the more distant relatives.

Legal provisions if no will

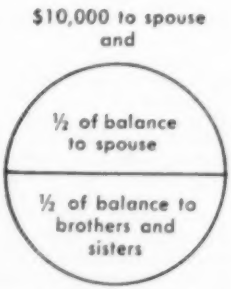
1. Man or woman dies, leaving a spouse (that is, a husband or wife) and one or more children or other descendants. The surviving spouse gets one-third of the total estate, with the children sharing equally the remaining two-thirds.

2. Man or woman dies, leaving one or more children or their descendants but no husband or wife. The estate is divided equally among the children. The share of a deceased child is divided equally among his descendants.

3. Man or woman dies, leaving his spouse and one or both parents, but no children or their descendants. The surviving husband or wife takes $5000 plus one-half of the remainder of the estate; the balance goes either to both parents, who share equally if both are living, or to the one parent surviving.



4. Man or woman dies, leaving husband or wife and a brother and sister or their descendants, but no children or their descendants or parents of his own. The surviving spouse is entitled to $10,000 and one-half of the remainder. The balance is distributed to the brothers and sisters or to the descendants of the deceased brothers and sisters.



[3] Facts on intestate legislation were taken from McKinney's *Consolidated Laws of New York*, Book 13, *Decedent Estate Law*, Article 3, Section 83.

5. Man or woman dies, leaving a husband or wife, but no children or their descendants, no parents, no brothers or sisters, and no nephews or nieces. The surviving spouse in that case is entitled to the whole estate.

6. Man or woman dies, leaving one or both parents, but neither spouse nor children nor their descendants. The surviving parent(s) takes the whole estate.

7. Man or woman dies, leaving no spouse, children, or other descendants, parents, brothers or sisters, or descendants of brothers or sisters. The whole estate is distributed to the nearest living blood relatives, according to their degree of relationship to the deceased person. In-laws are not eligible to inherit under these circumstances.

The law also states how intestate property shall be administered. If you are deciding whether or not to have a will, you may want to compare the procedure reported on wills on page 9 with the following general sequence of events. In New York State, when there is no will:

The person who seeks to handle the settling of the estate, that is, to be the administrator, files a petition at the surrogate's office for letters of administration.[4]

This person must say he is willing to assume responsibility for paying all debts out of the estate.

The surrogate determines whether or not a bond is required. (The bond assures the heirs that the estate will be reimbursed in case the administrator absconds with some of the funds.) The bond is ordinarily required. The unusual case in which the judge might not ask for a bond would be one in which there were no minor children and perhaps only one creditor such as the funeral director who may sign a waiver stating his willingness not to have the administrator bonded.

[4] It is customary to have a lawyer file the petition.

Finally, the administrator is selected by the surrogate.[5] Legally the widow or widower has prior right to appointment; and the order of priority after the surviving spouse is also designated by statute.

Also, in a case in which no will is left and there are children under 21 years of age, the judge appoints a general guardian to care for the general welfare of the child. The law provides that a child more than 14 years of age can indicate whom he wishes the judge to select. Ordinarily, the guardian has to be bonded to protect the children's rights. This is an expense for the estate. The charge for probate bonds in 1949 ran from a minimum of $10 annually for the first $1000 coverage up to a $3000 fee for $1,000,000. The size of the bond required is ordinarily based upon the total value of the personal property and 18 months' rental value of the real estate left by the deceased person.

Making a Will

Another choice offered by the laws of New York State in transferring property to heirs is to make a will. The following questions are among those commonly asked about this method:

1. Who may dispose of property by will?

All persons of sound mind and memory who are of legal age (21 years for real estate and 18 years of age for personal property such as bonds, automobiles, and farm equipment) are entitled to make a will.

2. To whom may property be willed?

Personal property may be willed to anyone.

Real estate may be willed to any individual[6] or to any corporation that has a charter permitting it to hold real estate. Real estate may not be willed, however, to an unincorporated association, such as an unincorporated church or charitable society unless it is authorized to receive property by specific legislation, or unless the society incorporates in order to take the gift.

3. Must you name all the members of your family in a will?

The law places some limits on your rights to will property away from your family.

The surviving spouse who is deprived by the will of the share he (or she) otherwise would have received usually has the right of election. That means he (or she) may ask the court to let him have the amount allowed by the law of intestacy.

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[5] If a person who has not been officially appointed does anything with property belonging to an estate, he can be held personally liable for whatever damage he causes the heirs or creditors.

[6] The right to will real estate to individuals is usually unlimited. States sometimes prohibit aliens, particularly those ineligible for citizenship, from taking title to real property.

A child who is born or adopted[7] after a will is made and who is not mentioned in it and who is unprovided for by any settlement outside the will has the right to the share he would have received if there had been no will. Other children not specifically named may contest the will; however, their share depends upon court decision.

A person who has a spouse, child, descendant, or parent may not leave more than one-half of his estate to charity.

4. What can be done through making a will to reduce the difficulties in settling an estate in which minor children are involved?

In a will, "power of sale" for real estate can be granted the executor so that property can be sold, even though there are minor children. This method greatly reduces the legal proceedings.

Also, the guardian named in a will does not have to give an accounting to the surrogate each year as does one who is appointed by the court.

5. If the testator (man or woman making a will) outlives a person to whom he wills some property, are the children of that person entitled to it?

If the person to whom the property was willed is a child or brother or sister of the testator, the child of this person will receive the property. For instance, if a farm were willed to a brother, and that brother died during the lifetime of the one who made the will, the farm would pass to the brother's children unless the will had been changed. But if the person to whom the property is left is not a child or brother or sister of the deceased, his children have no claim.

6. What happens to property acquired after the will is made?

Property acquired after the will is made, although not specifically mentioned in the will, will ordinarily be considered to pass under the residuary clause of the will.

7. What happens to the provisions of a will if a testator marries after the will is made?

If a person who made a will before September 1, 1930, later marries, his will is revoked. A will made after that date is not revoked, but the surviving spouse has a right to ask the court for his or her intestate share.

8. How much do lawyers usually charge for drawing a will?

The cost is said to range from $10 to $50 or more, depending upon the complexity of the problems involved, the size of the estate, and the reputation of the lawyer. More important than the cost is the selection of a lawyer who is careful and competent in drawing wills.

[7] It is important to seek the advice of a lawyer on the effect that adopting a child will have on the rights of other family members to your property. If you have brought up a child whom you have not adopted, and you wish him to receive some of your property, he must be specifically provided for in your will.

9. What formalities are required for a valid will?

The court considers a will valid (that is, admits it to probate) only if the following formalities are observed:

The statement must be in writing.

The pages must be in successive order.

The person making the will must sign it at the end, and must sign or acknowledge his signature in the presence of all of the witnesses.

The signer must inform these witnesses by oral or written statement that it is his last will and testament.

There must be at least two witnesses, each of whom must sign his name and place of residence at the end of the will. The safe practice is to have each witness sign in the presence of the other.

10. Is it practical to leave letters of instruction in place of, or supplementary to, a will?

To be legally acceptable, any letter of instruction must be signed in accordance with the provisions of the law for signing wills. Letters in which these formalities have not been followed are of no value.

11. If you want to change your will, what must you do?

The only sure way to change a will is to destroy it, add a codicil, or make a new will. If a will is destroyed, it is desirable to put that fact in writing. A codicil must follow the same formalities that the law requires for the original will. For instance, it must be witnessed in the same manner as the first will. Notations, erasures, or drawing of lines through items on the original document cause the court to question the wishes of the deceased at the time of his death. It is much safer to destroy the will and have a new one drawn.

12. Does the law require that a will be recorded with the surrogate of the county prior to the death of the testator?

No, but the law states that if a person wishes, he may deposit his will with the surrogate for safekeeping. A small fee is charged for this service.

13. When a will is made by a person while he is a resident of another State and is not revised when the person becomes a legal resident of New York, will it hold in court?

If the will conforms to the laws of either the State of New York or the State in which it was made, the property will be distributed in accordance with the will.

However, a similar piece of property cannot be substituted for one mentioned in the will. Any substituted property will be distributed according to the New York laws for intestacy unless a codicil is added or a new will is made.

14. May the ownership of real or personal property in several States cause difficulty in the settlement of an estate?

Yes, owning property of any appreciable value in another State requires setting up an "ancillary administration." It is a troublesome and expensive process. If you now have a savings bank account, for instance, in a State where you are not now living, you may want to consider changing the location of that account.

15. What procedure is required before the provisions of a will can be carried out?

The will must first be established as a valid will, that is, probated by the court. In New York State the procedure is as follows:

Filing the will. The will must be filed with the surrogate in the county courthouse. Anyone who finds or who has the will in his possession may file it. The will is, however, commonly turned over to a lawyer or to the person named in the will as executor. (You will note that he is called an *executor* rather than an *administrator,* the title applied to the person whom the court appoints in case of intestacy.)

Notification of interested persons. Notification must be given to all the heirs and next of kin, and all persons receiving anything under the will. (The executor usually turns the responsibility of notifying all these people over to an attorney.) They either may give their consent to the probating of the will or ask the court to hear their objections.

Proof by witnesses. The witnesses must testify to the surrogate that they witnessed the signing of this will. Only one witness is necessary at such a time in New York State, if an affidavit can be made that the other witness is dead or out of the State. If neither witness is alive, the court requires proof of the handwriting of witnesses and testator.

Acceptance of the will and appointment of the executor. When the requirements just described have been satisfactorily fulfilled, the surrogate signs a decree admitting the will to probate. He also grants the executor power to settle the estate. A surrogate judge pointed out that the heirs will find it to their financial advantage to encourage the executor to act promptly in filing papers and clearing real estate titles.

Joint Ownership

A third option in disposing of property is through joint ownership. Following is a description of three methods of owning property jointly—(1) joint tenancy, (2) tenancy by the entirety, and (3) tenancy in common—with an explanation of how each method affects inheritance rights.

Types of joint ownership

Joint tenancy

Two or more persons may own any kind of property as "joint tenants." On the deed or bill of sale transferring property, the names of all the owners must appear and ordinarily be followed by some such phrase as "with the right of survivorship" or "as joint tenants." With this arrangement, the death of one of the owners leaves the others with a clear title after clearance has been received from the State Tax authorities. For example, when a man owns a farm as joint tenant with two brothers, the survivors become the sole owners at his death. If a second brother dies, the third takes entire possession.

Under present legislation, however, New York State law considers that those who hold shares or deposit accounts in two or more names in *savings and loan associations, credit unions,* or *mutual savings banks* are joint tenants with survivorship rights even though survivorship is not mentioned. Also, present legislation does not permit survivorship rights to these particular holdings to be contested in court.

It is well to remember that joint ownership affects the owners' rights to income and to principal while they are alive. All the owners are entitled to an equal share in the profits. They must all sign any mortgage or instrument of sale. Joint ownership has other complexities. For example, if for any reason a judgment is taken by the courts against one of the owners, the title to the jointly held property may be questioned. A prospective buyer is likely to insist that the judgment be satisfied before he will complete the sale.

Tenancy by the entirety

A tenant by the entirety has, for practical purposes, the same interest as a joint tenant, that is, the survivor takes the entire estate. Tenancy by the entirety is possible only for a husband and wife and applies only to real property. The law presumes tenancy by the entirety if the persons named on the face of the deed are husband and wife; therefore, the deed may read "to John and Mary Doe," or "to John Doe and Mary Doe, husband and wife," or "to John and Mary Doe, tenants by the entirety."

Tenancy in common

Any kind of property may be held by two persons or more as tenants in common. The deed or bill of sale carries all the names and makes no reference to survivorship rights. With this kind of joint ownership, the owners, while they live, can each mortgage or sell his fraction of the whole estate without the others' consent. They share in the income from the property according to the amount they put in. When any of the

owners dies, his interest in the property goes to his own estate. If a man puts $5000 into a farm while two other men together put in $25,000, and they hold it as tenants in common, the heirs of the man who had invested $5000 would have a right to one-sixth of the value of that property.

Effect of joint ownership on the inheritance rights of minor children

Young families are particularly concerned about the effect joint ownership will have on their children's property rights.

When property is owned as *joint tenants*, as explained on page 10, the surviving owners take title to the deceased person's share. Consequently, the children of the deceased have no claim on the property.

When property is owned as *tenants by the entirety*, the surviving husband or wife owns the whole estate, and their children receive nothing. If both parents die at the same time without indicating in their wills what should be done in such a situation, a New York State statute provides that each parent shall be considered the outright owner of half the property. If either parent has a will, his half is distributed according to its provisions. If the other parent has no will, his half goes to the children in accordance with the intestate law of New York.

When property is owned as *tenants in common*, the deceased person's share is given to his children if they are named in a will. If there is no will his share is given to them according to the state law of intestacy.

Taking federal and state taxes into account

Tax legislation sometimes influences the choice of methods of settling an estate. Joint ownership, however, does not eliminate the estate tax, for both federal and state legislation make the original amount of the deceased person's contribution to the jointly owned property taxable.

At the present time, federal taxes apply to estates of more than $60,000. This total includes all life insurance. Exemptions from New York State taxes vary with relationship of the heirs to the deceased; for example, a widow would be exempt if the amount she received was not more than $20,000.

Persons with large estates will find it particularly important to be currently informed about changes in tax legislation.

Some Experiences in Transferring Property to Heirs

To find how frequently farm families had problems in settling estates and to learn some of the kinds of difficulties they had, the authors interviewed some farm families, studied some surrogate court records, and

studied some abstracts of cases taken to court.[8] The illustrations from families' experiences have points we all would do well to keep in mind in choosing a method of settlement.

Sources of Family Experiences

Of a group of families in Cayuga County, New York, interviewed in the fall of 1948,[9] more than one-fourth had made no arrangements as to who would inherit the farm itself. Among the other three-fourths, joint ownership of the farm by husband and wife was as far as most of them had gone. Many had made no plans as to how the ownership of equipment, livestock, and other personal property would be transferred. In other words, these families were making little use of wills; and they had not given much thought to the other ways of transferring property.

Some inkling as to why they apparently were unconcerned about who would inherit their property was found in their answers to a question about the problems they had encountered in settling estates. More than three-fourths of the families said they had not observed any problems.

A study of the surrogate court records in Tompkins County, New York, of the estates settled during the 18-month period preceding January 1949 revealed that less than one-fourth of the 40 farm families had a will. About half of the estates had been divided according to the provisions of the law for those without a will. None of these estates had been contested in court.

An agricultural economist looked at a summary of these transfer practices and said, "Is it possible that families bother less about inheritance when farm prices are high than when they are low?" To answer that question, a study was made of the Tompkins County surrogate court records covering 18 months of the years 1932 and 1933, a depression period. Again, nearly one-half of the 42 cases settled during these years had made no written provision for settlement of their estates; but of those who had some plan, almost all had made a will. Joint ownership of the property was rare. Only two of the estates had been subjected to a court contest.

A study was made of the abstracts of cases taken to court in New York State between 1930 and 1946, to find what kinds of problems had arisen.

Ninety-two of the cases applied to farm families. Among these, the families had gone to court largely because the wills were not clear or seemed to be contrary to legal requirements. Problems about legal requirements included such details as signing without the witnesses being

[8] This research was conducted at the New York State College of Home Economics between 1947 and 1949 under the title, "Financial Problems of Farm Families in the Settlement of Decedent Estates."

[9] Sixty-four interviews were made by experienced enumerators in three different farming sections of the county. Grateful acknowledgment is made of the cooperativeness of these families in answering the interviewers' questions.

present and fastening together the sheets of paper on which the will was drawn in a way not prescribed by law. In only six cases was court action taken because of something that arose after the death of the person who left the estate.

Families' Experiences and What They Mean

Actual situations found through the interviews, in the probate court records, and in the abstracts of court contests brought out a number of helpful points to keep in mind when deciding upon an appropriate way to transfer your property.

Prompt settlement under joint tenancy

In a number of estates, joint ownership proved to be a satisfactory way to transfer property to heirs. One farmer died without a will but with the cattle, farm machinery, crops, and a 70-acre farm all in his wife's name and his own. Therefore at his death, the wife became sole owner of all the property. The two sons also benefited eventually from this arrangement because the estate was settled in a short time and with little expense.

Problems of joint tenancy

Apparently the problems connected with joint ownership resulted largely from changes in personal relationships between the owners. For example, a wife who was somewhat unbalanced mentally was unwilling to allow her husband to sell the farm she owned with him as a joint tenant. In another family, an uncle and a nephew who were joint tenants disagreed as to what farm machinery should be bought. Owning property as joint tenants makes it necessary for the owners to agree.

Spouse's right to property

The person who has no children and wishes his wife to receive property that is of much value needs to make a will or to arrange for joint ownership. As you recall, the intestate law in New York State protects the surviving spouse only up to $5000 if the parents of the deceased are living, and up to $10,000 if the parents are dead but brothers or sisters remain. A man with a wife, a sister and two nephews left two small farms, livestock, farm and household equipment, crops, and cash. His wife was able to inherit all of it only because it was valued at less than $10,000. If the property had risen in value at the time the estate was settled, a will would have protected her against losing part of the estate to her sister-in-law.

Reducing cause for disagreement

The chance for disagreement among survivors may be increased by dependence on the intestate law. In one large family, one of the unmarried brothers died without making a will. Each survivor claimed that he had received oral promises. At various intervals several of the brothers had worked the farm with the one now deceased. Since no inventory

had ever been taken of the property, it was difficult to determine the ownership of the equipment. The matter was taken to court. If the brother had made a will, this reason for court action could have been avoided.

Provision for children who have cared for elderly parents

Many farm families are said to have had problems arise because parents who promised a large share of their property to the children who looked after them in old age failed to put it in writing. In one instance, a daughter stayed at home to help with the work on the farm. When she was well over 21 years of age, she married the hired man. After many years the parents died, leaving no will. The daughter's five brothers and sisters then claimed their intestate shares, and the daughter and her husband were left without a special claim. Either a will or a legally drawn contract would have made it possible for the daughter to receive what she had been promised. Unless there is something in writing, the court presumes that children's services are rendered out of filial love.

Personal choice of executor

A will has an advantage also in that you can name your own executor. This gives you more assurance that your estate will be handled as you wish it to be than when it is left in the hands of a person named by the surrogate. One farmer with all the property in his own name died while his children were still young. He had willed his widow the life use of the estate without power to sell, and appointed a brother to be executor and to operate the farm. Later when the mother remarried and had other children, the original family felt that their father's arrangement had been a good one. The will gave the father an opportunity to select the person he wished to look after his property and also to be assured that his own children would inherit the farm eventually. (Of course, granting life use of the farm might have proved a hardship. Much unhappiness can be created by dictating through one's will how others should live.)

Clear wording of a will

Difficulty may arise even with a will if it is not clearly worded. In one, the court had to decide whether the testator meant to include his automobile along with the personal and household effects willed to a daughter, or whether he intended the automobile to become a part of the remainder willed to someone else. In another will, the term, *cash on hand*, required court interpretation. It would have been easier for the heirs if the testator had stated clearly whether the term meant money in the bank as well as money in his immediate possession. Again, an estate would have been settled more easily if the widow's right to use the principal as well as the income from the property had been made specific. In another, the person had expressed a *wish* or a *desire* in his will for the way he

wanted his property divided. The court ruled that such statements were unenforceable hopes and need not be carried out by the executor.

Shrinkage in estate value

When making a will, one should consider that the estate might decrease in value. In one instance, bequests to persons named in the will amounted to more than the value of the entire estate at the time it was probated. The desires of the deceased could have been carried out in spite of the drop in the value of the estate if he had said whether he wished the distribution to be on a percentage basis or to be paid to certain persons in a given order.

Maintenance of the estate during life use

Difficulty arose another time from failure to make a provision in the will for repairs on real estate. The wife gave her husband life use of the farm, and the children were to receive it when he died. He and his second wife let the place run down for lack of repairs. The daughter-in-law said it was easy to see now that the will should have specified that the property be kept in repair during life use, and then the value of the farm would have been maintained for the children. However, if the children had sought legal advice, it is very possible that they would have found they had a legal remedy against the life tenant for waste of the property.

Keeping the farm intact

To allow the property owned by one person to be distributed according to the law of intestacy can also create some problems. A farmer's wife had the deed to the farm in her name and made no will. At her death, the ownership was divided among four daughters and three sons. The records do not indicate whether or not the farm was split into seven parcels. Division of property often results in small parcels of land that because of their small size make poor farms. The children do not profit in the long-run and yet personal relationships may hinder a more economical kind of sharing. In such a case, the parent who provides by will to keep the farm intact will probably be doing his children a kindness.

Continuous farm operation

To allow the property to go according to the law of intestacy may also interfere with the continuous operation of a business. For example, a farmer who died without making a will had personal property in his own name, and a large farm that was owned jointly with his wife. When he died, the farm went directly to his wife. The personal property, however, was divided according to the New York State intestate law; one-third to the wife and the remainder to the daughter. Since the personal property included livestock and equipment, the wife's share may not have been enough to carry on the farm work. Through a will the husband could have prevented this.

In Brief

How can you transfer your property to others?

You have three possibilities in transferring your property to others at death: (1) let your property be distributed according to the state law designed for those who have no will; (2) make a will; or (3) while you are alive share the ownership with someone else as a "joint tenant" so, upon your death, the property belongs to the other person. Your choice determines not only who receives your property, but also how much difficulty the heirs have in settling your affairs.

What methods of transferring property are common?

Interviews in Cayuga County, New York, revealed that few farm families planned anything about the way their property would be distributed at their death except to put the title of the farm in both the husband's and wife's name. Study of surrogate court records of settled estates also showed that the common method of transferring property to heirs was by the state law applying to those who have no will.

Have you considered which method you will use?

You will want to ask yourself questions such as these when you are deciding what plan best fits your situation.

1. How will the state law distribute my property if I die without a will? Will my property go to the ones I want to have it?

2. Will the method I choose leave my heirs free to make decisions about the estate as conditions change?

3. Are minor children, such as my brothers' or sisters' descendants, likely to complicate the matter of settlement?

4. If I use joint ownership as the way to transfer property after death, am I creating some problems for myself during my lifetime?

5. What effect will the method I am considering have on family harmony?

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